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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. ~~994~~ 131

STANLEY E. HENWOOD, RICHARD I. ROEMER and LEWIS M. POE, individually and as members of the United Industrial Corporation Stockholders' Protective Committee and as proxies of said Committee,
Petitioners,

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,
Respondents.

BRIEF OF RESPONDENT UNITED INDUSTRIAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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No. 994

STANLEY E. HENWOOD, RICHARD I. ROEMER and LEWIS M. POE, individually and as members of the United Industrial Corporation Stockholders' Protective Committee and as proxies of said Committee,

Petitioners.

vs.

SECURITIES AND EXCHANGE COMMISSION and UNITED INDUSTRIAL CORPORATION,

Respondents.

BRIEF OF RESPONDENT UNITED INDUSTRIAL CORPORATION IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Petitioners seek review of an order of the Court of Appeals for the Ninth Circuit which modified* and affirmed the judgment of the United States District Court for the Southern District of California invalidating proxies obtained by petitioners through the use of false and misleading proxy solicitation material with respect to the *1961* annual stockholders' meeting of the respondent United Industrial Corporation (hereinafter referred to as "United" or the "Company").

* In particulars not here pertinent.

Petitioners' application to stay the issuance of the mandate was denied by the Court of Appeals for the Ninth Circuit on April 24, 1962. Their petition for rehearing had been denied on February 28, 1962. Petitioners' applications to restrain the holding of the 1962 annual meeting of United were denied on April 30, 1962 by the Court of Appeals and on May 8, 1962 by Mr. Justice Douglas. Such 1962 meeting was accordingly held on May 9, 1962, the date fixed by the Company's by-laws.

Opinions Below

The memorandum opinion, findings of fact, and conclusions of law of the United States District Court for the Southern District of California are reported in CCH Fed. Sec. L. Rep. ¶ 91,125. The opinion of modification and affirmance of the Court of Appeals for the Ninth Circuit is printed in Appendix A annexed to the petition and is reported in 298 F. 2d 641.

Jurisdiction

The petitioners invoke the jurisdiction of this Court under 28 U. S. C. § 1254(1). The jurisdiction of the District Court was invoked under 15 U. S. C. § 78aa.

Questions Presented

The basic questions presented by the petition may be summarized as whether the delegation of authority by the Congress to the Securities and Exchange Commission to promulgate "proxy rules" by Section 14 of the Securities Exchange Act of 1934, 15 U. S. C. § 78n, and the promulgation of such rules, Regulation 14A, 17 C. F. R. § 240.14a, are unconstitutional either on their face or as applied to

this case. Such issues were not raised before the Trial Court but were attempted to be raised for the first time before the Court of Appeals.

The petition also raises the question whether the stockholders of the respondent United are indispensable parties. This question was not raised before either Court below.

Counter-statement of the Facts

This is an action instituted by the Securities and Exchange Commission pursuant to the provisions of Section 21(e) and Section 21(f) of the Securities Exchange Act of 1934, 15 U. S. C. § 78u(e) and § 78u(f). The complaint (C. T. 2)* recites that the defendants, other than the defendant United, have engaged or are about to engage in acts and practices in violation of Section 14(a) of the Securities Exchange Act of 1934, 15 U. S. C. § 78n(a) and of Regulation 14A, 17 C. F. R. § 240.14a, prescribed by the Securities and Exchange Commission to govern the solicitation of proxies in respect of any security registered and listed on any national securities exchange. The complaint charges that the petitioners, individually and as members of the United Industrial Corporation Stockholders' Protective Committee (hereinafter referred to as the "Committee"), have solicited proxies for use at the 1961 annual stockholders' meeting of United by means of statements which were false and misleading with respect to material facts and which *omitted* to state material facts. It specifies the failure of such proxy statements to disclose the part played by the defendants Gira, Petersen and Yaras in the initiation and organization of the Committee and

*C. T. refers to Volume I of the Transcript of the Record (Clerk's Transcript).

their participation in the proxy solicitation in opposition to the existing management of the Company (C. T. 2).

United is incorporated under the laws of the State of Delaware and is an industrial complex engaged in the operation of various businesses through wholly owned subsidiaries and divisions located throughout the United States (Exs. 14; LL). It resulted from the merger on December 31, 1959 of United Industrial Corporation, an old line Michigan corporation, the stock of which had for many years been listed on the New York Stock Exchange, and Topp Industries Corporation, a corporation which had originally been organized in the State of California in 1951 by the defendants Gira and Petersen and which was engaged principally in the electronics industry (Exs. 14; LL). All of the business and assets of Topp Industries Corporation, a Delaware corporation, were prior to October, 1959 owned and operated by Topp Industries, Inc., a California corporation (Ex. LL). Upon the consummation of the merger, the operation of United was vested in the former principals of both Topp corporations (Ex. 14). The defendant Gira, the former president of both Topp corporations, became the president and chief executive officer of United and the defendant Petersen, the former vice-president of both Topp corporations, became the executive vice-president of United (Exs. 14; LL). The board of directors was divided between the former directors of Topp Industries and former directors of the old United Industrial Corporation. The common stock of the Company, of which more than 2,000,000 shares were outstanding, was listed for trading on the New York Stock Exchange and the preferred stock, of which over 1,000,000 shares were outstanding, was listed for trading on the American Stock Exchange. (Exs. 14; LL). Warrants were also listed on the American Stock

Exchange. All these securities in addition were listed on the Pacific Coast Stock Exchange (Ex. LL).

After consummation of the merger Gira and Petersen gradually moved the executive offices of the Company to Los Angeles, which had been the principal place of business of Topp Industries, Inc., and thereafter the operations of the Company were conducted from these offices (Ex. LL). For the year ended December 31, 1960, the first fiscal year of its operations, the Company showed an operating loss in excess of $6,000,000 (Exs. 13, 14). Early in January of 1961 Arthur Young & Co., the Company's independent accountants, made a direct request to the board of directors that they be accorded an opportunity to appear before the board and disclose information which had come to their attention requiring very substantial write-downs in the Company's assets, occasioned by material misstatements which had been made by officers of the Company in the interim financial statements, and the evaluation by officers of the Company of certain inventories and deferred charges. A meeting of the board of directors was held in Los Angeles on January 12, 13 and 14, 1961 (R. 17).* At the conclusion of this meeting the board asked for and received the resignation of the defendants Gira and Petersen as officers and directors of the Company (R. 61; Ex. 14A; Ex. 33, p. 190). By order of the board of directors the preliminary findings of the independent accountants were made known to the Securities and Exchange Commission, the New York Stock Exchange, and to the financial institutions which had financed the Company (Ex. 14A). As a result of these disclosures trading in both the common and preferred stock of the Company was suspended (Exs. 13, 14A). (Over-the-counter trading was re-

* R. refers to Volume II of the Transcript of the Record (Reporter's Transcript).

sumed on September 22, 1961 (C. T. 236). Trading of the Company's securities was resumed on the Pacific Coast Stock Exchange on November 16, 1961).

As a consequence of these occurrences eight stockholders derivative actions have been instituted against the Company and its former and present directors in the Courts of the State of Delaware and the Courts of the State of New York (Ex. 14). The Company has also instituted an action in the Courts of the State of Delaware against Gira and Petersen and others (Ex. 14). The annual meeting of the Company is appointed by its by-laws to be held on the second Wednesday in May of each year (Ex. 14A). The Rules and Regulations of the Securities and Exchange Commission require that the Company's annual report be furnished the stockholders at or prior to the time proxy solicitation is undertaken by the management in connection with the annual meeting. Rule 14A-3 (b), 17 CFR § 240.14a-3 (b). As a result of the conditions which were reflected in the preliminary findings reported by the Company's auditors, Arthur Young & Co. was unable to complete the annual audit and furnish certified financial statements until long after the date appointed for the 1961 annual meeting (Ex. 14). Seeking to take advantage of this circumstance and to regain control of the Company the defendants Gira and Petersen caused the formation of the so-called Stockholders' Protective Committee whose members are named as defendants in this action. The formation of this Committee, the proxy solicitation it has undertaken and the participation of the defendants Gira and Petersen formed the subject matter of this action.

Early in April of 1961 (Ex. 13) the Committee, having filed incomplete and misleading statements with the Securities and Exchange Commission, mailed to the stockhold-

ers of the Company proxy solicitation material using a stockholders list which had been surreptitiously taken from the Company by Gira and Petersen (R. 78, 280, 355, 1182, 1250, 1251, 1252, 1253). This stockholders list was the only list available to the Company (R. 169). The falsity of the Committee's proxy material, the misrepresentations which it contained and the material facts it omitted were fully developed on the trial of this action. Knowing full well that the management of the Company was foreclosed from soliciting proxies by virtue of the Securities and Exchange Commission regulations and the unavailability of the audited annual report, the Committee instituted an action in the Court of Chancery for the State of Delaware to enjoin any postponement of the 1961 annual meeting and thus assure the success of their attempt to regain control of the Company (R. 1290). The Securities and Exchange Commission expressed its view by letter to the Chancellor in such action on behalf of United and voiced its objection to this attempted perversion of its regulations. After a hearing on the merits the Delaware Court of Chancery denied the relief sought by the Committee and sanctioned the necessary adjournment of the 1961 annual meeting.

Upon the dissemination of the false and misleading proxy statement the Company acted promptly to protect the interest of its stockholders. On April 25, 1961, some three months prior to the commencement of the instant case, it instituted an action in the United States District Court for the Western District of New York against these same defendants with the exception of the defendants Yaras and Shafer (C. T. 272). The complaint (C. T. 272) in the corporate action, just as the complaint in the case at bar (C. T. 2), charged that the defendants solicited

proxies for use at the 1961 annual meeting by false and misleading statements with respect to material facts and by omitting in their proxy statements certain material facts. The complaint in the corporate action (C. T. 272) went on to specify failure of the defendants' proxy material to disclose the connection of Gira and Petersen with the solicitation and their relationship with various members of the so-called Stockholders' Committee and other participants in the solicitation. An injunction was sought to prevent the defendants from voting the proxies that they had obtained and from continuing to solicit proxies by false and misleading statements (C. T. 272).*

Final judgment in the case at bar was entered by the District Court on October 18, 1961. The petitioners obtained a stay pending the hearing and determination of their appeal from the District Court's judgment. After some delay and motions by the petitioners for additional time, the argument of the appeal herein came on to be heard before the Court of Appeals for the Ninth Circuit on January 12, 1962. Such Court on January 17, 1962 in a *per curiam* opinion, reported at 298 F. 2d 641, modified the judgment of the District Court and as so modified affirmed the District Court's judgment. The petitioners, twenty-seven days later, petitioned the Court of Appeals for the Ninth Circuit for a rehearing and filed a motion for modification of the judgment. On February 28, 1962 such Court denied the petition for rehearing and the motion for modification of the judgment.

Through the proceedings hereinabove referred to petitioners succeeded in preventing this publicly held Com-

* Findings similar to those made in the case at bar were made in this private litigation on February 8, 1962 by Judge John W. Holland, sitting by assignment in the United States District Court for the Southern District of California after venue had been changed. The judgment of the Court is reported in CCH Fed. Sec. L. Rep. ¶ 91,142. Certain of the defendants have filed a notice of appeal therefrom.

pany from holding its 1961 annual meeting of stockholders. The proxies solicited by the petitioners were solicited for the annual meeting of stockholders called in 1961. The management also solicited, and at great expense, proxies for said meeting, but was unable to use the same because petitioners prevented the holding of the 1961 annual meeting. As stated before, the by-laws of this Delaware corporation fix the second Wednesday in May of each year for the date of the annual meeting (Ex. 14A). Therefore, on April 10, 1962 the board of directors called for the date appointed by the aforementioned by-law the 1962 annual stockholders' meeting and caused notice thereof to be given to the stockholders. Said notice and the accompanying proxy statement all pertain to the annual meeting of 1962 and not the annual meeting of 1961.

On April 24, 1962 petifioners moved the Court of Appeals for the Ninth Circuit for an order restraining United from holding the 1962 annual meeting and for a further order staying the mandate pending the filing, consideration and disposition by this Court of a petition for a writ of certiorari. By order dated and filed the same day that Court denied the relief sought by the petitioners and stated that its January 17, 1962 "decision became final on Mareh 5, 1962, but through inadvertence the mandate" had not yet issued. The Court further ordered the mandate to issue forthwith. Such order of the Court of Appeals is annexed hereto as Appendix A. It is significant to note that in this same order the Court of Appeals for the Ninth Circuit stated that:

> "• • • This case is not one likely under the practice of the Supreme Court to be taken up by the Court on certiorari."

On April 30, 1962 petitioners moved the Court of Appeals for the Ninth Circuit for an order punishing United and its

president for an alleged violation of that Court's order with respect to the solicitation of proxies for, and the calling of, the 1962 annual meeting. The Court obviously took notice of the fact that the within action had reference to the 1961 annual meeting and denied any such relief in an order handed down the same day. A copy of said order is annexed hereto as Appendix B.

Thereafter petitioners moved before Mr. Justice Douglas for an order restraining United from holding the 1962 annual meeting. Such application was denied by Mr. Justice Douglas on May 8, 1962.

Accordingly, the 1962 annual meeting of stockholders was held as scheduled on May 9, 1962 in Wilmington, Delaware. At such 1962 annual meeting 68% of the common and 72% of the preferred stock voted for the management slate. Since these votes represented proxies rescinding all prior proxies it is clear that a substantial portion of the proxies held by the Committee was revoked. A copy of the president's report to United's stockholders dated May 21, 1962 is annexed hereto as Appendix C.

In addition it should be pointed out that the proxies received by the Committee were of stockholders as of December 30, 1960, the date of the stockholders list from which the Committee solicited. With a substantial amount of trading having taken place in United's securities, it is obvious that as of April 9, 1962, the record date for the stockholders entitled to vote at the meeting held on May 9, 1962, the stockholders were substantially different from those that the Committee solicited.*

* The petition is misleading where the claim is asserted that the petitioners had proxies for 1,200,000 votes for the 1961 annual meeting. What petitioners failed to disclose in their testimony and now fail to disclose in their argument are the facts that these proxies were solicited by the use of false and

(Footnote continued on following page)

United was named as a defendant in this action solely for the purpose of enabling the Court to grant adequate relief by way of ordering an adjournment of the 1961 annual meeting of stockholders which was imminent at the time of the institution of this action (C. T. 2). No other claim is made against the Company in this case (C. T. 2). Consonant with its role as a nominal defendant the Company did not take an active part in the trial of the action. No proof was offered on its behalf and cross examination on its behalf was confined to clarification. This course was dictated in recognition of the paramount public interest represented by the Securities and Exchange Commission and by the further circumstances that as the trial developed it became apparent that the defense was founded in an attack upon the procedures and, indeed, the integrity of that government agency (R. 883, 885, 893, 894, 1178). Nonetheless, the Company has a very vital interest in the outcome of this litigation because it profoundly affects private interests represented by the corporate business and financial community and the 15,000 stockholders who own the Company. The record in this case and the judicial determination that has been made thereon in the public interest confirms the action it has taken in protection of the private interests it has a duty to represent.

(Footnote continued from preceding page)

misleading proxy material and that, moreover, these proxies were obtained at a time when management had not commenced to solicit proxies (Exs. 13, 14). The form of proxy was not mailed by management until June 26, 1961 (Ex. 14) whereas the Committee had already at that time mailed its so-called report No. 1, dated March 27, 1961, its report No. 2, and its report No. 3, dated May 26, 1961 (Ex. 13). There were eligible 2,642,148 votes to be cast at the 1961 stockholders' meeting (Ex. 14). After management commenced its solicitation, it accumulated proxies for in excess of 1,400,000 votes and the proxies of the Committee were substantially reduced by those running to management revoking the earlier ones held by the Committee.

Argument

The determination of the trial Court was based squarely on findings of fact. Since these findings were sustained by the Court of Appeals and there is no attempt to demonstrate clear error, this Court will not review the determination herein. *Pick Manufacturing Co. v. General Motors Corp.*, 299 U. S. 3 (1936).

This action became moot upon the calling and holding of the 1962 stockholders' meeting.

This action has become moot and academic as the 1962 annual meeting of stockholders of United was held on May 9, 1962. (See Appendix C.) The within action pertains solely to the solicitation of proxies for the 1961 annual stockholders' meeting. It is fundamental law that when it appears in an action or proceeding for an injunction that the act sought to be prevented has occurred the case is moot and will not be reviewed by this Court. *Jones v. Montague*, 194 U. S. 147 (1904). The duty of the Court "is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in the case before it". *Mills v. Green*, 159 U. S. 651, 653 (1895). See also *Amalgamated Association v. Wisconsin Employment Relations Board*, 340 U. S. 416, 418 (1951).

In *Holmes v. United Mutual Life Ins. Co.*, 2 N. Y. 2d 1001 (1957) a proceeding to compel the reinstatement of a director of a corporation was dismissed as moot when an election of directors was held and the term of the petitioner's office had expired. The Court would not decide the case on the merits as to do so would be to decide a moot question. In *Sawyer v. Pioneer Mill Co.*, 300 F. 2d 200

(9th Cir. 1962) the Ninth Circuit dismissed an appeal involving the application and enforcement of the Securities and Exchange Commission's proxy rules because the stockholders' meeting for which the proxies were solicited had been held. The case at bar is even more compelling because the next succeeding annual stockholders' meeting has now been held.

The constitutionality of the statute and proxy rules has heretofore been determined.

The question of constitutionality of the Securities Exchange Act of 1934 has long since been determined. In 1956 the Second Circuit upheld both the constitutionality of Section 14(a) of the Securities Exchange Act of 1934 and the validity of the proxy rules "as applied either to management or to insurgent stockholder groups". The Court rejected a defense that the Section and the proxy rules were "unconstitutional as unauthorized delegations of legislative power and otherwise", the "otherwise" evidently referring to the argument of prior restraint under the first amendment. Chief Judge Clark, speaking for a unanimous Court, stated in *S. E. C. v. May*, 229 F. 2d 123, 124 (2nd Cir. 1956):

> "Appellants argue that § 14(a) of the Securities Exchange Act of 1934, 15 USC § 78(a), and regulations adopted thereunder are unconstitutional as unauthorized delegations of legislative power and, otherwise; *but these contentions have no merit.* American Power & Light Co. v. S. E. C., 329 U. S. 90, 67 S. Ct. 133, 91 L. Ed. 103; Yakus v. United States, 321 U. S. 414, 64 S. Ct. 660, 88 L. Ed. 834. Furthermore, the Commission's proxy rules as applied either to management or to insurgent stockholder groups are clearly authorized by statute." (Emphasis added.)

This Court determined in *Donaldson v. Read Magazine*, 333 U. S. 178, 191 (1947), in sustaining the postal fraud

order statute, that the first amendment did not inhibit legislation like the Securities Exchange Act of 1934 which is designed to prevent fraud or deception of the public with respect to such areas as securities.

Petitioners argue that even if their proxy material was false and misleading, the Court has no power to invalidate their proxies. This argument is without merit. Once the Court's jurisdiction is properly invoked under the Securities Exchange Act of 1934 it has all the inherent powers of a Court of Equity. As the Third Circuit said in *S. E. C. v. Transamerica Corp.*, 163 F. 2d 511, 518 (3d Cir. 1947), *cert. denied* 332 U. S. 847 (1948), the trial Court "possesses the authority to make any order necessary to enforce liabilities or duties created by the Act or rules * * *"

Pointing out that Section 22(a) of the Securities Act of 1933, 15 USC § 77v(a), gave specified Courts jurisdiction "of all suits in equity and actions at law brought to enforce any liability or duty created by" the act, the Court stated in *Deckert v. Independence Shares Corp.*, 311 U. S. 282, 288 (1940):

> "The power to *enforce* implies the power to make effective the right of recovery afforded by the Act. And the power to make the right of recovery effective implies the power to utilize any of the procedures or actions normally available to the litigant according to the exigencies of the particular case. If petitioners' bill states a cause of action when tested by the customary rules governing suits of such character, the Securities Act authorizes maintenance of the suit, providing the bill contains the allegations the Act requires. That it does not authorize the bill in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment recovered under § 12(2)."

Section 27 of the Securities and Exchange Act of 1934, USC § 78aa, has identical language in this respect. Ac-

cordingly, since equity will not suffer an offender to enjoy the fruits of his illegal action, the Courts have enjoined the *use* of proxies obtained through illegal solicitation. *S. E. C. v. O'Hara Committee*, 28 F. Supp. 523 (D. Mass. 1939); *S. E. C. v. Okin*, 58 F. Supp. 20 (S. D. N. Y. 1944); *S. E. C. v. May*, 229 F. 2d 123 (2d Cir. 1956).

The relief formulated by the Trial Court in the case at bar which permitted the Committee and the petitioners herein to resolicit is a remedy of which they cannot complain. They did not choose to take advantage of this opportunity given to them to resolicit.* As wrongdoers the relief granted accords to the petitioners an opportunity that equity does not generally reserve for them.

Stockholders of United are not indispensable parties in this proceeding.

No stockholder of United has sought to intervene in this action although all stockholders have been advised of these proceedings. The petitioners certainly have no standing to raise the issue as the decree runs to them and not to stockholders. Moreover, any such requirement to bring in fifteen thousand stockholders would be a practical impossibility.

In the case at bar the petitioners raise the lack of what they argue are indispensable parties before this Court for the first time. They did not move under Rule 12(b) of the Federal Rules of Civil Procedure prior to pleading, nor did they raise such defense in their responsive pleading. Neither did they raise the issue in any subsequent pleading or at the trial on the merits under Rule 12(h) of the Federal Rules of Civil Procedure.

* The Trial Court restrained the holding of the 1961 meeting until 34 days after the entry of its judgment and the Court of Appeals restrained the holding of such meeting for 60 days after its judgment became final.

The absence of an indispensable party is waived by the failure to assert the fact as a defense. *Mastercrafters Clock & Radio Co. v. Vacheron & Constantin-LeCoultre Watches, Inc.*, 221 F. 2d 464, 467 (2d Cir. 1955), *cert. denied* 350 U. S. 852 (1955), *reh. denied* 350 U. S. 897 (1955).

The stockholders are no more indispensable in this proceeding than the principal is in an action commenced against an agent for his fraudulent acts in obtaining his agency if such act violates public policy. The Commission commenced this action to protect the interests of the public and the stockholders as such and is so charged with this duty by statute. Securities Exchange Act of 1934 § 21(e), 15 USC § 78u(e).

Conclusion

For all the foregoing reasons and because the decision in the case at bar is not in conflict with the decision of any other Court of Appeals on the same matter, nor is it in conflict with applicable decisions of this Court, and there is no important federal question which has not been, but should be, settled by this Court, it is respectfully submitted that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

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RAICHLE, MOORE, BANNING AND WEISS,
RALPH L. HALPERN,
Of Counsel.

June 18, 1962

APPENDIX A

Order of the Court of Appeals for the Ninth Circuit Dated April 24, 1962.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STANLEY E. HENWOOD, *et al.*,
Defendants and Appellants,

v.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff and Appellee,

and

UNITED INDUSTRIAL CORPORATION,
Defendant and Appellee.

No. 17591.

ON MOTION FOR ORDER EXTENDING RESTRAINING ORDER

Before: Hamley, Hamlin and Merrill, Circuit Judges.

The motion for an order extending the restraining order entered herein by the Honorable Thurmond Clarke, United States District Judge, as modified by this court on January 17, 1962, is denied.

Treating the motion referred to above as one for a stay of mandate pending the filing, consideration and disposition by the Supreme Court of the United States of a peti-

tion for writ of certiorari to this court for the purpose of obtaining a review of the decision rendered herein on January 17, 1962, and it appearing that the decision became final on March 5, 1962. but, through inadvertence, the mandate of this court has not yet issued, and being of the opinion that this case is not one likely under the practice of the Supreme Court to be taken up by that Court on certiorari, and that the balance of convenience does not require a withholding of our mandate herein, it is

ORDERED that the motion for a stay of mandate be and the same is hereby denied, and the mandate shall issue forthwith.

Dated: April 24, 1962.

FREDERICK G. HAMLEY.
OLIVER D. HAMLIN, JR.
CHARLES M. MERRILL.

APPENDIX B

Order of the Court of Appeals for the Ninth Circuit Dated April 30, 1962.

At a Stated Term, to wit: The October Term 61, of the United States Court of Appeals for the Ninth Circuit, held in the Court Room thereof, in the City of San Francisco, in the State of California, on Monday the 30th day of April in the year of our Lord one thousand nine hundred and sixty-two.

Present: Honorable Frederick G. Hamley,
Presiding.

Honorable Oliver D. Hamlin,
Honorable Ben. C. Duniway,
U. S. Circuit Judges.

STANLEY E. HENWOOD, *et al.*,
Defendants and Appellants.

vs.

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff and Appellee.

and

UNITED INDUSTRIAL CORPORATION,
Defendant and Appellee.

No. 17,591.

ORDER DENYING MOTION

The motion of appellants for an order holding certain appellees in contempt, etc., coming on this day for hearing,

there being no appearance on behalf of the appellants, Mr. Ralph L. Halpern argued for the appellee United Industrial Corporation. Mr. Frank E. Kennamer, Jr., attorney of Securities and Exchange Commission, being present, and waiving oral argument, and thereupon the Court ORDERED THE MATTER submitted for consideration and decision.

On consideration thereof, IT IS FURTHER ORDERED that said motion be, and hereby is denied.

APPENDIX C

President's Report to Stockholders of United Industrial Corporation Dated May 21, 1962.

UNITED INDUSTRIAL CORPORATION
660 Madison Avenue, New York 21, N. Y.

May 21, 1962

Fellow Stockholders:

The 1962 Annual Meeting of Stockholders of the company was held as scheduled on May 9, 1962, at Wilmington, Delaware.

The management slate of directors for both common and preferred stock were unanimously elected by the vote of those present in person and by proxy. Approximately 68% of the common stock and 72% of the preferred stock eligible to vote participated.

Earnings for the First Quarter of 1962

We are pleased to report that the company earned a profit of $186,795 in the quarter ended March 31, 1962, on sales of $8,006,987. This compares with a loss of $66,907 on sales of $8,097,076 in the same period last year, although results as to sales and earnings are not comparable for the reason that 1961 results included sales and income from subsidiaries which were sold or discontinued during 1961.

Earnings prospects for the balance of the year appear to be favorable. Earnings for the second quarter should exceed first quarter earnings.

Appendix C.

Backlog of the company stands at an all time high of approximately $26 million.

Cordially yours,

BERNARD FEIN,
President.